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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 1033

THOMAS H. BROOKS AND AUGUST J. MAUREAU, JR.,
Petitioners,

vs.

THE UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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THE UNITED STATES OF AMERICA,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of Thomas H. Brooks and August J. Maureau, Jr., citizens of the United States, domiciled in the State of Louisiana, respectfully bring this, their application for Writs of Certiorari, to review the final judgment of the United States Circuit Court of Appeals for the Fifth Circuit in this Criminal Case.

Opinion Below

Petitioners were convicted on April 5, 1957, in the United States District Court, for the Eastern District of Louisiana, of violating Title 18 Section 1621 U.S.C.—Perjury.

Thomas H. Brooks, was found guilty on counts two (2) and three (3) of an original four (4) count Indictment. Sentence was imposed on May 15, 1957, petitioner, being condemned to serve eighteen (18) months in a Penal Institution of the United States on count two (2) and eighteen (18) months on count three (3) the sentence on count three (3) to run concurrently with the sentence imposed on count two (2).

August J. Maureau, Jr., was found guilty on counts one (1), two (2), and three (3) of an original four (4) count Indictment.

Sentence was imposed on May 15, 1957, petitioner, being condemned to serve eighteen (18) months in a Penal Institution of the United States, on counts one (1), two (2) and three (3) the sentence on counts two (2) and three (3) to run concurrently with the sentence imposed on count one (1).

Petitioners, thereupon, took their appeal to the United States Circuit Court of Appeals for the Fifth Circuit, where judgment was rendered affirming their conviction on March 18, 1958.

Petitioners, within the delays allowed, filed their petition for a rehearing in the said United States Circuit Court of Appeals for the Fifth Circuit, which petition for rehearing was denied on May 7, 1958, with no written opinion rendered.

On May 9, 1958, a stay of mandate was ordered by the said United States Circuit Court of Appeals for the Fifth Circuit, for a period of thirty (30) days, from May 7, 1958, to enable petitioners to apply to this Honorable Court for Writs of Certiorari to review said final judgment of the United States Circuit Court of Appeals for the Fifth Circuit.

Jurisdiction

Jurisdiction of this Honorable Court is invoked under paragraph (1) Section 1254 Title 28, U.S.C.A., making it competent for this Honorable Court to review by certiorari any case, civil or criminal, in a Circuit Court of Appeals, and the application is made within 30 days after entry of judgment, (denial of Rehearing), as required by Rule 22 of this Honorable Court, effective July 1, 1954, and in the manner required by Rule 21 of this Honorable Court.

Summary Statement of Matter Involved

Your petitioners, Thomas H. Brooks and August J. Maureau, Jr., members of the New Orleans Police Department, were indicted, separate indictments, dated September 13, 1955, and returned by a Grand Jury empaneled and duly qualified in the Eastern District of Louisiana.

There were four (4) counts to each indictment. Both defendants were found not guilty on count four (4) of each indictment but were found Guilty on counts one (1), two (2) and three (3) of the respective indictments.

On June 26, 1956, the District Court, sentenced each defendant to serve eighteen (18) months on each count, the sentence on counts two (2) and three (3) to run concurrently with the sentence on count one (1).

From said verdict and sentence, petitioners filed an appeal to the United States Circuit Court of Appeals, Fifth Circuit. On January 31, 1957, after a hearing, the said United States Circuit Court of Appeals, Fifth Circuit, reversed the Judgment of conviction of the District Court, and remanded the matters to the District Court for a new trial.

On April 5, 1957, petitioners were re-tried on counts one, two and three of each indictment and Thomas H.

Brooks was found not guilty on count one and guilty on counts two and three.

August J. Maureau, Jr., was found guilty on all three counts of the indictment against him.

In each count of each indictment, petitioners were charged with Perjury, allegedly committed before the Special Agents of the New Orleans District of the Intelligence Division of the Internal Revenue Service of the United States Department of the Treasury, which was then and there investigating the income tax returns of certain high Police Officials of the New Orleans Police Department and of one, Lionel Andrew Dominguez.

The income tax returns of the two petitioners were not under investigation.

Reasons Relied on for Allowance of Writ

The reasons relied on for the allowance of Writs of Certiorari are:

(1) The alleged false statements must be material to the issues under investigation to sustain a conviction for perjury.

(2) The trial Judge mingled the duty of the Court and Jury, leaving to the Jury no discretion but to obey the direction of the Court, when he charged the Jury that the questions and the answers which each defendant gave, and which answers are the basis upon which each count is based, were material, relevant, competent and pertinent to the investigation.

Argument

Point I

It is the contention of Petitioners that the alleged false statements were not material to the investigation being

carried on by the Special Agents of the Revenue Service.

The purpose of said investigation was to determine if any of the persons under investigation owed income taxes resulting from concealed income. Petitioners income taxes were not under investigation.

The alleged false statements contained in the Indictment against Thomas H. Brooks were as follows:

COUNT II

That he at no time has been to the residence of Lionel Andrew Dominguez, 1655 North Roman Street, New Orleans, Louisiana.

COUNT III

That he has at no time, while assigned to the Fifth District, New Orleans Police Department, received any envelopes from Lionel Andrew Dominguez.

The alleged false statements contained in the Maureau indictment are as follows:

COUNT I

That he has never driven his private automobile to the address of 1655 North Roman Street, New Orleans, Louisiana, said automobile being described as a Nash automobile bearing 1954 Louisiana License No. 152-004.

COUNT II

That he has never been to the residence of Lionel Andrew Dominguez, 1655 North Roman Street, New Orleans, Louisiana.

COUNT III

That he never accompanied Sgt. Thomas H. Brooks of the New Orleans Police Department to the address 1655 North Roman Street, New Orleans, Louisiana.

The alleged false statements could not of themselves, have been material to the investigation being conducted.

Whether or not they were there, would not in any way establish that the persons under investigations had sources of income which they had not reported.

How could a negative or affirmative answer, have pertained to or in any way impeded or assisted the investigation being conducted?

In order for false testimony to be material to the issues, being investigated, it must pertain to those issues. The essence of perjury is the attempted advantage being sought toward influencing the result.

If the incorrect or alleged false statements, even though willful, cannot affect the issues or result, the statute penalizing perjury does not cover such testimony. *Clayton* v. *United States*, 284 F. 537, 4th Cir. (1922). *Pyle* v. *United States* 156 F. (2d) 852 D.C. (1946).

The prosecution did not introduce any evidence to show how the alleged false statements of petitioners were in any way material to the income tax returns of the persons under investigation.

The materiality of the matter testified to by the defendant upon the issues in the case must be established by evidence and cannot be left to presumption or inference. *Rich* v. *United States*, 1 Okla. 354 (1893) 33 P. 804.

Point II

The Trial Court in its charge (instructions) to the Jary, gave the following charge, in reference to the alleged questions asked and the alleged answers given by the defendant, being material to the issues under investigation by the Special Agents of the Internal Revenue Service.

> "Now it is further incumbent upon the Government to establish beyond a reasonable doubt that the ques-

tions propounded by Agents and answers made by each defendant were material and relevant and competent to the investigation which they were then and there conducting. Now that is a matter of law. I charge you as a matter of law; that means, I do not leave it to you to decide; the Court decides as a matter of law and instructs you that the questions and answers, in each of the two indictments, were competent, material and relevant to the investigation then and there being conducted by the Internal Revenue Agent who was questioning each of the two defendants."

After the Jury retired and had been deliberating on the case for about four hours, they returned into Court for further instructions upon this point, and the following transpired:

Juror:

"Your Honor, I'd like a clarification of one of the points of your charges—your charge to the Jury.

Does the Jury or the Judge have the authority to decide if the sworn statements of the defendants were pertinent to the case which was under investigation by the Special Agents of the Intelligence Division and has the Jury been instructed by the Judge that the information that the Agents were seeking from the defendants was pertinent to the investigation?"

The court:

"Let me answer that."

"I charge you as a matter of law—I'll repeat that portion of the charge. I charge you as a matter of of law, which means, I do not leave it to you to decide but that the Court decides as a matter of law and instructs you, that the questions and answers in

each of the three counts in each of the two indictments, were competent, material, and relevant to the investigation then and there being conducted by the Internal Revenue Agent, who was questioning each of the two defendants.

"So the Court decides as a matter of law and has decided as a matter of law and has decided and so instructs you that the questions and the answers which each defendant gave and which answers are the basis upon which each count is based, were material, relevant, competent and pertinent to the investigation."

It is obvious, that the Trial Court by its instructions, on this point, took away from the Jury, its right to decide what the issues were, that were under investigation by the Special Agents of the Revenue Service.

The defendants in pleading "not guilty" traversed the fact, that the alleged false testimony, alleged to having been given in the investigation, was given at all; and they also traversed the fact, as to what the issues were that were under investigation.

The Trial Court did not attempt to clarify its instructions by telling the Jury, *that they should decide from the evidence what the issues were that were under investigation by the Agents of the Revenue Service* and that they should decide *what answers the defendants gave or if they gave any answers, whatsoever.*

The Trial Court by its instructions decided these facts for the Jury, when it charged the Jury; "So the Court decides as a matter of law and has decided and so instructs you that the questions and the answers which each defendant gave. . . ."

In the matter of *Luse* v. *United States*, 49 F. (2d) 241, it was held:

"In perjury case, plea of not guilty, traversed the fact that the alleged testimony at the former trial was given at all, and it was for the Jury to say whether such testimony was given."

Whether or not the evidence on these points was sufficient to convince the Jury, that the defendants had or had not made the alleged false statements as contained in the indictments, was a matter solely to be decided by the Jury hearing the case and not by the Trial Judge.

It is a rule well settled, that it is peculiarly within the province of the Jury to decide upon the weight and sufficiency of the evidence to establish the facts or issues. *United States* v. *Mann*, 108 F. (2d) 354; *Ryan* v. *United States*, 99 F. (2d) 864; *United States* v. *Morley*, 99 F. (2d) 683.

Transcript Annexed

The record for the use of the Court below having been certified by the clerk of the United States Court of Appeals, Fifth Circuit, is filed herewith.

Conclusion

Wherefore, for the foregoing reasons, petitioners, Thomas H. Brooks and August J. Maureau, Jr., respectfully pray that a Writ of Certiorari issue to the United States Circuit Court of Appeals, for the Fifth Circuit, to the end that this cause may be reviewed and determined by this Honorable Court; and that the Judgment of said United States Circuit Court of Appeals for the Fifth Circuit, may be in due course reversed and set aside, and that Judgment may be rendered in favor of Petitioners, setting aside their convictions and sentence pronounced below and discharging them forthwith; and petitioners

pray for all such further and necessary orders proper in the premises.

And for all such relief as the nature of the case may justify.

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Attorney for Petitioners.

JUDGMENT

Extract from the Minutes of March 18, 1958

No. 16701

THOMAS H. BROOKS AND AUGUST J. MAUREAU, JR.,

vs.

UNITED STATES OF AMERICA

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 16701

THOMAS H. BROOKS AND AUGUST J. MAUREAU, JR., APPELLANTS,

vs.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the Eastern District of Louisiana.

(March 18, 1958)

Before BORAH, TUTTLE and CAMERON Circuit Judges

CAMERON, Circuit Judge: Appellants appeal from judgments of conviction of perjury[1] contending (1) that their

[1] 18 U.S.C.A. § 1621: "Perjury Generally: Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury . . ."

alleged false testimony was not material to the question under inquiry and that it was error for the trial court to charge the jury that, as a matter of law, it was material; and (2) that the admission of evidence to show that $60.00 in cash was placed in an envelope and handed to one of the defendants in the presence of the other defendant was prejudicial error.[2] Based upon these contentions they argue that the convictions should be set aside. For the reasons hereinafter set out, we do not agree.

The evidence showed that Agents Perry and Cabellero of the Intelligence Division of the Internal Revenue Service were conducting an investigation of certain police officials of the City of New Orleans to ascertain whether they had received graft monies which had not been reported in their income tax returns; and also whether one Lionel Andrew Dominguez, a known lottery operator, was guilty of evasion of income or excise taxes. Appellants were members of the New Orleans police force, and they testified under oath before the revenue agents after they had been advised of the nature and scope of the investigation, substantially as is set forth in the counts of the indictment under which they were respectively convicted.[3]

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[2] Appellants were convicted on the same charges on a former trial, and we reversed the conviction on a point not here presented. Brooks and Maureau v. United States, 1957, 240 F. 2d 905.

[3] Appellant Brooks was convicted of testifying falsely to the Revenue Agents:

"Count II

That he at no time has been at the residence of Lionel Andrew Dominguez, 1655 N. Roman Street, New Orleans, Louisiana.

Count III

That he has at no time while assigned to the Fifth District, New Orleans Police Department, received any envelopes from Lionel Andrew Dominguez."

Appellant Maureau was convicted of falsely testifying to the agents:

"Count I

That he has never driven his private automobile to the address of 1655 N. Roman Street, New Orleans, Louisiana, said automobile being described as a Nash automobile bearing 1954 Louisiana License No. 152-004.

To establish the falsity of these statements of appellants and their materiality to the matters under investigation, the Government relied on the testimony of the two revenue agents, who testified over objections of appellants to these facts:

On July 23, 1954, they were in the residence of said Dominguez, who operated two lottery companies. Dominguez answered the ringing of his doorbell and came back to the table where Dominguez' auditor was at work, and removed from a large bag of money, sixty dollars in currency which Agent Perry counted and marked. Dominguez placed the money in an envelope and marked a small *d* in the corner.[4] He took the envelope and delivered it to appellant Brooks, who was waiting outside the door at the top of the steps. Agent Cabellero had placed himself where he could see what transpired and both testified to the salient facts. They observed outside of Dominguez' residence a green Nash automobile bearing the license number mentioned in the Maureau indictment. Appellant Maureau was waiting outside for Brooks, and the two got into the front seat of the automobile and drove off, appellant Maureau doing the driving. Upon this proof they were tried on consolidated separate indictments and were found guilty of the charges outlined in the indictments quoted in Footnote 3 *supra*.

Relying upon certain cases cited by them,[5] appellants argue, first, that the testimony given by them to the revenue

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Count II

That he has never been to the residence of Lionel Andrew Dominguez, 1655 N. Roman Street, New Orlans, Louisiana.

Count III

That he has never accompanied Sgt. Thomas H. Brooks of the New Orleans Police Department to the address 1655 N. Roman Street, New Orleans, La."

[4] The purpose of marking the money and the envelope was to be able to identify both as coming from Dominguez if they should be found in the safety deposit box or the possession of any of the officers under investigation.

[5] Luse v. United States, 9 Cir., 1931, 49 F. 2d 241; Clayton v. United States, 4 Cir., 1922, 284 F. 537; Pyle v. United States, D.C. 1946, 156 F.2d 852; and Beckanstin v. United States, 5 Cir., 1956, 232 F.2d 1.

agents was not material to the investigation of graft by certain police officials or of income or excise tax evasion on the part of Dominguez. An examination of the cases fails to show that they support appellants' contentions. On the other hand, they tend to sustain the Government's position.

The burden was upon the Government to show that appellants' testimony was material to the matter under investigation. *Blackmon* v. *United States*, 5 Cir., 1940, 108 F.2d 572. In that case, we discussed the authorities at some length and set forth in detail what constituted materiality, and no good purpose would be served by repeating here the tests so carefully spelled out there. Subjected to those tests, the materiality of the statements here involved is plain.

The jury verdicts established that appellants did, in fact, drive up to the home of a known lottery operator and did participate in the joint enterprise of receiving in a sealed envelope $60.00 in currency from him. If these facts placed before the jury showing what transpired on July 23rd had been truthfully disclosed to the agents making the investigation when appellants were first questioned, they would have tended to furnish a link in the chain of circumstances the agents were endeavoring to forge against the police officials under investigation. The fact that Dominguez was, under the circumstances disclosed, engaged in paying sizeable sums of money to police officers would also, if true answers had been given by appellants, have aided the agents in arriving at the amount of income and excise taxes due by him. Without the proof at the trial that money was placed in the envelope, the acts of appellants in driving up to Dominguez' house and receiving an envelope from him might well have been argued to be lacking in any connection with the investigation in progress.

The contention of appellants that the question of the materiality of the false statement should not have been settled as a matter of law but should have been submitted to the jury, is without merit. *Beckanstin* v. *United States*, 5 Cir., 1956, 232 F.2d 1; *Harrell* v. *United States*, 5 Cir., 1955, 220 F.2d 516; and *Blackmon* v. *United States*, *supra*.

Equally without merit under the circumstances disclosed by the record, is the contention that the court below erroneously admitted evidence that $60.00 was placed in the envelope by Dominguez and turned over to appellants. Such proof as demonstrated above was necessary in order to show the materiality of the alleged false statements, made by appellants to the government agents, to the matters under investigation. If the Government had proved only that Dominguez had delivered to appellants an envelope, it could well have been contended that the statements of appellants set forth in the indictments did not relate to a material matter. The trial court was careful to limit the purpose and effect of this evidence that money was placed in the envelope by a statement made to the jury immediately following its reception.[6]

Finding the contentions of appellants to be without merit, and that appellants were given a fair trial by the court below, which was diligent to preserve all of their legal rights, the judgment is AFFIRMED.

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[6] "Now let me say to the jury, the Court has permitted some testimony here—admitted some testimony here with respect to the cash which this witness says was placed in the envelope. Now I caution the jury that these defendants, neither of these defendants is charged with improperly receiving any money. They are not charged with receiving any money from Dominguez or anyone else. The count having to do with the envelope, count three of one of the indictments, that is, the Brooks indictment has 'The Grand Jury realleges all of the allegations contained in paragraph one of count one of this indictment.' 'That he has at no time while assigned to the Fifth District, New Orleans Police Department received any envelopes from Lionel Andrew Dominguez.' So the Court believes that that evidence was admissible; the fact that something was placed in the envelope—admissible for whatever weight it would have with respect to the materiality of this investigation. It is not admitted for the purpose of proving any improper payment to any one of these defendants. They are not charged with that. Keep that in mind. They are charged with making false statements."

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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 1033

THOMAS H. BROOKS AND AUGUST J. MAUREAU, JR.,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. 11-15) is reported at 253 F. 2d 362.

JURISDICTION

The judgment of the Court of Appeals was entered on March 18, 1958 and a petition for rehearing was denied on May 7, 1958 (Pet. 2). The petition for a writ of certiorari was filed on May 28, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence supported the conclusion that the testimony upon which petitioners' perjury convictions were based related to a material matter.

2. Whether the trial judge properly treated the issue of materiality as one to be decided by the court and whether he properly instructed the jury on that subject.

STATUTE INVOLVED

18 U.S.C. 1621 provides in pertinent part:

> Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury * * *.

STATEMENT

Petitioners seek review of the judgment of the Court of Appeals affirming their convictions in the United States District Court for the Eastern District of Louisiana for perjury committed in the course of an official Internal Revenue investigation. Petitioner Brooks was convicted (R. 235-236) under counts 2 and 3 of his indictment, charging that he had falsely sworn that he at no time had been at the residence of Lionel Andrew Dominguez, 1655 North Roman Street, New Orleans, Louisiana (count 2), and that he had at no time, while assigned to the Fifth District, New Orleans Police Department, received any envelopes from Lionel Andrew

Dominguez (count 3). He was acquitted under count 1 charging that he had falsely sworn that he had never driven in petitioner Maureau's automobile and stopped in front of the North Roman Street address (R. 2-4). Petitioner Maureau was convicted under each of three counts of his indictment (R. 236-237), charging that he falsely swore (1) that he had never driven his Nash automobile to 1655 North Roman Street in New Orleans, (2) that he had never been to the residence of Lionel Andrew Dominguez at the same address, and (3) that he never accompanied petitioner Brooks there (R. 5-6, 17-20). Each was given concurrent sentences of eighteen months' imprisonment on the counts of which he was found guilty (R. 235-237).[1]

The pertinent facts may be summarized as follows:

In July 1954, Special Agents Perry and Caballero of the Intelligence Division of the Internal Revenue Service were engaged in an investigation of one Lionel Dominguez, the owner of two lottery enterprises in New Orleans, and various officials of the New Orleans police department. This investigation was for the dual purpose of ascertaining (1) whether Dominguez was evading the 10 per cent federal tax on gross earnings from wagers, and (2) whether officials of the New Orleans police department had received "payoffs" in the period 1949 to 1954 which were not reflected in their income tax returns (R. 50-51, 68-69, 70, 85, 87-88, 97-98,

[1] At a prior trial, each had been found guilty on the first three counts and acquitted under a fourth. The Court of Appeals reversed on the ground that the court erred in ruling that it was for the court and not the jury to determine whether the Special Agent of the Internal Revenue Service who had administered oaths to the defendants had authority to do so. *Brooks v. United States*, 240 F. 2d 905 (C.A. 5).

116, 134-135, 142-143). On July 22, 1954, in connection with this investigation, Special Agents Perry and Caballero went to the home of Dominguez at 1655 North Roman Street in New Orleans and examined his books and records (R. 106, 136). While the agents were there, they arranged with Dominguez to return the next day (R. 106-107, 136).

At about 8:50 a.m. on July 23, 1954, the two agents returned to the North Roman Street address and obtained Dominguez's records from his bookkeeper Cressy (R. 107-108, 137). About 9:05 a.m. the doorbell rang, and Dominguez answered it. The officers observed that petitioner Brooks was standing at the top of the front steps of the house and that petitioner Maureau was standing on the sidewalk near the bottom step (R. 112, 137-138, 139). Petitioners were officers of the New Orleans police department and were on leave from their regular duties that morning (R. 27-31). The revenue officers also observed a green 1946 model Nash automobile, bearing license plate number 152-004, in front of the house (R. 112, 140-141). Dominguez instructed Cressy to hand him a small brown coin envelope. On receipt of the envelope, Dominguez removed $60 from a money bag. Agent Perry marked the bills and Dominguez placed them in the envelope, which he then marked with a distinctive mark. Dominguez went to the door and handed the envelope to petitioner Brooks at the top of the front steps (R. 109-112, 137-140). At about 9:15 a.m., the officers saw both petitioners drive off in the Nash automobile, Maureau at the wheel and Brooks accompanying him (R. 113, 140). The automobile was later identified by its license number as belonging to Maureau (R. 36).

On August 16, 1955 and on August 31, 1955, respectively, Brooks and Maureau were called into the office of the Intelligence Division of the New Orleans District of the Internal Revenue Service. This was not for the purpose of investigating petitioners' tax status, but to determine whether money had passed between Dominguez, as proprietor of the lotteries, and identified high police officers whose tax status was under investigation (R. 117-120). Petitioner Brooks appeared on August 16, 1955, was informed why he had been called to testify, and was placed under oath (R. 39-42). He then proceeded to give voluntary testimony during the course of which he denied (1) ever driving in Maureau's automobile and stopping in front of 1655 North Roman Street; (2) ever being at the residence of Lionel Dominguez at that address; (3) ever receiving any envelopes from Dominguez while assigned to the Fifth Police District; and (4) receiving money from Dominguez on July 23, 1954 (R. 85-96). On August 30, 1955, Brooks was called back to read over his answers. After making one minor change, he was sworn and he signed the statement as true and correct (R. 52-54).

Petitioner Maureau appeared for questioning on August 31, 1955 and the same formalities were followed (R. 55). He denied (1) driving his private automobile to 1655 North Roman Street; (2) ever being at the residence of Dominguez at the same address; and (3) ever accompanying petitioner Brooks to that address (R. 97-103). Maureau returned on September 6, 1955, read over his statement, and signed it under oath (R. 55-56).

After the foregoing evidence had been introduced,

petitioners moved for a directed verdict on the ground that the questions and answers were not material to the investigation which the Internal Revenue Service conducted. The court denied the motion (R. 153-160).

The charge to the jury included instructions covering the presumption of innocence, the concept of reasonable doubt, the elements of perjury which it was the government's burden to prove, and the quantum of proof required. In respect to the issue of materiality of the questions and answers set forth in the indictments, the court instructed the jury as follows (R. 205-206):

> Now it is further incumbent upon the Government to establish beyond a reasonable doubt that the questions propounded by the agent and the answers made by each defenant [sic] were material and relevant and competent to the investigation which they were then and there conducting. Now that is a matter of law. I charge you as a matter of law, that means I do not leave it to you to decide, the Court decides as a matter of law and instructs you that the questions and answers in each of the three counts, in each of the two indictments, were competent, material and relevant to the investigation then and there being conducted by the Internal Revenue Agent who was questioning each of the two defendants.

On the jury's subsequent request, the court gave them additional instructions on various issues pertinent to the case (R. 212-225). One of the jurors then asked the court (R. 225), "Does the jury or the judge have the authority to decide if the sworn statements of the defendants were pertinent to the case which was under

investigation by the Special Agents of the Intelligence Division and has the jury been instructed by the judge that the information that the agents were seeking from the defendants was pertinent to the investigation?" The court replied (R. 225-226):

> Let me answer that.
>
> I charge you as a matter of law—I'll repeat that portion of the charge. I charge you as a matter of law, which means I do not leave it to you to decide but that the court decides as a matter of law and instructs you that the questions and answers in each of the three counts in each of the two indictments were competent, material and relevant to the investigation then and there being conducted by the Internal Revenue Agent who was questioning each of the two defendants. So the Court decides as a matter of law and has decided and so instructs you that the questions and the answers which each defendant gave and which answers are the basis upon which each count is based, were material, relevant, competent and pertinent to the investigation.

ARGUMENT

1. Petitioners challenge the rulings of both courts below that the questions and answers upon which their perjury convictions are based related to a material matter. The evidence established that the Internal Revenue investigation in the course of which the statements were made was designed to ascertain whether Dominguez was evading wagering taxes and whether highly placed New Orleans police officers were receiving payoffs not reflected in their income tax returns. The appearance of petitioners, two police officers, at the

home of Dominguez, and their receipt from him of an envelope containing $60 in currency suggested, at the very least, that there might be a causal connection between the activities of Dominguez, the lottery operator, on the one hand, and petitioners' superiors in the New Orleans police force, on the other, and that petitioners might be middlemen between the subjects of investigation. Had petitioners truthfully answered the questions concerning the events of July 23, 1954, their answers, as the Court of Appeals observed, might "have tended to furnish a link in the chain of circumstances the agents were endeavoring to forge against the police officials under investigation." 253 F. 2d at p. 364. The questions asked were thus material to the inquiry being conducted by the Internal Revenue Service. Compare *United States* v. *Moran*, 194 F. 2d 623, 626 (C.A. 2), certiorari denied, 343 U.S. 965.

2. Petitioners also challenge the trial court's disposition of the issue of materiality (Pet. 6-9). The instruction on this issue (see the Statement, *supra*, pp. 6-7) was correct. Materiality is a question of law to be decided by the court, not the jury. *Sinclair* v. *United States*, 279 U.S. 263, 298-299; *United States* v. *Parker*, 244 F. 2d 943, 950 (C.A. 7); *Beckanstin* v. *United States*, 232 F. 2d 1 (C.A. 5); *Harrell* v. *United States*, 220 F. 2d 516 (C.A. 5).

The court's instruction did not preclude the jury from determining whether the answers were actually given by petitioners in response to questioning. The court made it clear both in its charge (R. 205-206) and in its supplementary instruction to the jury on this issue (R. 225-226) that "the questions and answers in

each of the three counts, in each of the two indictments" were material, *i.e.*, that the answers *alleged* to have been given were in fact material to the inquiry of the Internal Revenue Service. In other instances when the court referred to the answers which were the basis of the charge of perjury, it employed the qualifying term "alleged" in order to preclude any confusion between what had been charged and the facts at issue for the jury's determination (*e.g.*, R. 194, 197, 206, 213). The court did not suggest that the answers were in fact given, and the excerpt which petitioners cite (Pet. 8), taken in context, does not import such meaning (see the Statement, *supra*, p. 7). The court's extended charge to the jury (R. 185-211) clearly and fairly informed them that it was their province to determine whether the answers were in fact given (as well as all other elements of perjury), and that they must presume the accused innocent in every respect until proved guilty.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

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